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No. 82-275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TERRI ANN MIENER, by and through her next friend and parent, Clyde J. Miener,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,

and

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, MISSOURI, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SPECIAL SCHOOL DISTRICT RESPONDENTS IN OPPOSITION

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September, 1982

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QUESTIONS PRESENTED

1. Whether the court of appeals' decision that Petitioner cannot recover money damages under the Education for All Handicapped Children Act of 1975 conflicts with the Seventh Circuit's decision in *Anderson* v. *Thompson*, 658 F.2d 1205 (1981), or is otherwise erroneous.

2. Whether the court of appeals misapplied decisions of this Court in holding that Petitioner's prayer for relief in the form of compensatory education constituted a claim for damages for purposes of determining Respondents' immunity under the Eleventh Amendment.

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JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit in the present case was entered on February 4, 1982. On April 27, 1982, for extraordinary reasons, the Eighth Circuit granted permission to the Special School District

Respondents[1] to file a petition for rehearing on or before May 11, 1982. That petition was timely submitted, and was denied by the Eighth Circuit on May 20, 1982. The Special School District Respondents received Plaintiff-Appellant's Petition for a Writ of Certiorari on August 18, 1982.

STATEMENT OF THE CASE

Petitioner's statement of the case provides an adequate factual background for resolution of the two issues raised in the Petition. The Special School District Respondents wish to note, however, that the present Petition is in fact a cross-petition and that the original petition for certiorari in this case was filed by the Special School District Respondents on July 12, 1982, and has been docketed as No. 82-61. A fuller statement of the facts and of the Eighth Circuit's decision may be found in the Petition in No. 82-61.

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[1] The parties herein referred to as the "Special School District Respondents" are the Special School District of St. Louis County, Missouri; the Board of Education of the Special School District of St. Louis County, Missouri; and Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri.

REASONS FOR DENYING THE WRIT

I. Recoverability of Damages under EAHCA.

Petitioner's first ground for seeking certiorari is that the Eighth Circuit's holding that Petitioner cannot recover money damages under the Education for All Handicapped Children Act of 1975 (EAHCA), 20 U.S.C. § 1401 *et seq.* (1976 & Supp. IV 1980), conflicts with the decision of the Seventh Circuit in *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981). In considering the availability of a damage remedy under EAHCA, both the Eighth Circuit in the present case and the Seventh Circuit in *Anderson* defined the issue as whether Congress intended to permit monetary relief when, in Section 615(e)(2) of the Act, 20 U.S.C. § 1415(e)(2) (1976), it allowed aggrieved parents to seek judicial review in State or federal court and authorized the court to "grant such relief as the court determines is appropriate." *See Miener* v. *Missouri*, 673 F.2d 969, 979 (8th Cir. 1982); *Anderson*, 658 F.2d at 1209. The Eighth Circuit found "[t]he reasoning and research of the Seventh Circuit on this point [to be] conclusive," 673 F.2d at 979, and decided, as had the *Anderson* court, that "a damage remedy was not generally intended" by Congress. *Id.* at 980. Accordingly, the court affirmed the dismissal of Petitioner's claim for damages under EAHCA.

Petitioner nevertheless asserts that these two decisions conflict because the Eighth Circuit refused to discuss two "exceptional circumstances" which the *Anderson* court believed would warrant the recovery of damages under EAHCA by a handicapped child or his parent. The first such circumstance was a serious risk of injury to the child's physical health due to the school district's current placement of the child and the district's failure to provide him with necessary services that it was required by law to provide. The second special circumstance consisted of the school district's "act[ing] in bad faith by failing to

comply with the procedural provisions of section 615 in an egregious fashion." *Anderson*, 658 F.2d at 1214. Petitioner contends that her Complaint sufficiently alleged the existence of these special circumstances to bring her case within these two exceptions, that she was therefore prejudiced by the Eighth Circuit's refusal to recognize the exceptions, and that this Court should grant certiorari to resolve the conflict between the circuits.

There are several flaws in Petitioner's reasoning. First, the discussion of exceptional circumstances in the *Anderson* opinion was pure dictum, since neither set of circumstances existed in the *Anderson* case itself.[3] In deciding a future case that actually presents, in the context of a concrete pattern of facts, the special circumstances described in *Anderson*, the Seventh Circuit will not be bound by the *Anderson* dicta and may conclude, for reasons unforeseen by the *Anderson* panel or simply because of a differing analysis, that one or both of the exceptions hypothesized in *Anderson* do not in fact exist. Thus, even if we assume for the moment that Petitioner's case falls within the exceptions suggested in *Anderson*, there is still no conflict between the Seventh and Eighth Circuits, because the former has not yet *held* that someone in Petitioner's situation *can* recover damages under EAHCA. The "conflict" sufficient under Supreme Court Rule 17.1(a) to warrant the exercise of this Court's discretionary jurisdiction should be more substantial than the refusal of one circuit to endorse the dicta of another circuit whose holding it adopts.

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[3] The Eighth Circuit clearly recognized the hypothetical nature of the *Anderson* court's remarks. *See Miener*, 673 F.2d at 980 (emphasis added):

> We depart from the Seventh Circuit's analysis, however, insofar as that court *in dictum* recognized two exceptional circumstances in which a limited damage award might be appropriate.

The second flaw in Petitioner's argument is that regardless of the precedential force of the *Anderson* court's discussion of exceptional circumstances, Petitioner's case does not fit within either of the *Anderson* exceptions. The Seventh Circuit explained the reason for the exceptions and their scope as follows:

> In those situations it is likely that Congress, though generally requiring that a child remain in his current placement [pending the resolution of disputes under Section 615 of the Act], 20 U.S.C. §615(e)(3) [*sic*], would have intended that parents take action to provide the necessary services for their children without awaiting the outcome of lengthy administrative and judicial proceedings. Parents should then be compensated for the costs of obtaining those services that the school district was required to provide.[12]
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> . . . .
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> 12 *Parents' costs of obtaining services that the school district was required to provide are the only appropriate money damages in these exceptional circumstances. In no event can we imagine that tort liability damages were intended.*

Anderson, 658 F.2d at 1213 & n.12 (emphasis added).

Petitioner claims to come within the first exception—a risk of injury to the child's physical health due to the school district's present placement of the child—by virtue of paragraphs 53 and 57 of her Complaint, which allege that Petitioner suffered beatings and attacks while she was a resident of the St. Louis State Hospital, an institution of the Missouri Department of Mental Health. For several reasons, the first *Anderson* exception does not apply in Petitioner's case. First, and most important, paragraphs 23 and 25 of the Complaint clearly state that, at the time this suit was commenced and for more than two

years prior thereto, Petitioner was a *voluntary* resident at the State Hospital. Her residence there was not the result of an educational placement by the Special School District Respondents or by any other Defendants in this case. Furthermore, Petitioner's parents did not withdrawn her from the State Hospital and place her elsewhere, and therefore incurred no costs for alternate services which the Seventh Circuit recognized as "the only appropriate money damages." The nearly $525,000 in damages actually sought by Petitioner were strictly in the nature of "tort liability damages," which the *Anderson* court could in no event imagine Congress having intended.

Petitioner's claim that the second exceptional circumstance — *i.e.*, egregious failure of the school district to comply with the procedural provisions of Section 615 of the Act, 20 U.S.C. § 1415 (1976) — was alleged in her case is even less substantial, since Petitioner's parent never even initiated the hearing procedures of Section 615 before bringing suit. As one reason for her failure to exhaust administrative remedies under EAHCA before suing, Petitioner did allege in paragraph 36(C) of her Complaint that the hearing procedure established under Missouri law failed to comply with Section 615 in several respects. Nowhere, however, is it alleged that Petitioner's parents incurred costs in obtaining appropriate educational services for Petitioner in order to avoid delays that would have resulted from resort to the Missouri hearing provisions. Such costs would be the only "damages" recoverable under the second *Anderson* exception. As stated above, the only monetary relief sought by Petitioner was of the nature of tort damages.

Thus, the inapplicability to Petitioner's case of the two hypothetical exceptions to the general no-damages rule discussed in *Anderson* constitutes a second reason why there is no conflict between the Seventh and Eighth Circuits on this issue. It should also be noted that the Eighth Circuit did not automatically reject the possibility of damage recoveries under EAHCA, merely

because the *Anderson* discussion of exceptions had been dictum. Rather, the Eighth Circuit cited and briefly summarized three district court decisions in which the courts had held that, in certain circumstances, parents of handicapped children were entitled under EAHCA to reimbursement of the costs of obtaining appropriate educational services for their children.[3] On one of these cases the *Anderson* court had expressly patterned its first exception, *see* 658 F.2d at 1213, and the other two cases had been cited elsewhere in the *Anderson* opinion, *see id.* at 1210, and no doubt underlay the second exception. The Eighth Circuit remarked as follows:

> These cases reach a result which claims our sympathies, and which may be appropriate in special circumstances. But in the present case, nothing in the record suggests that appellant bases her claim to damages on exceptional circumstances like any of those in the cited cases. Moreover, as applied to the case at bar, the rationale of the cited cases relies on legislative history which we regard as insufficient to support a general right of recovery.

Miener, 673 F.2d at 980. Thus, whether Petitioner's claim for damages under EAHCA should be excepted from the general rule was fully considered by the Eighth Circuit, and that court reached the same conclusion as the *Anderson* court would have reached. There is simply no conflict between the Seventh and Eighth Circuits on this question.

In the alternative, Petitioner repeats her argument that a general damages remedy should be available under Section

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[3] *Tatro* v. *Texas*, 516 F. Supp. 968, 977-80 (N.D. Tex. 1981); *Monahan* v. *Nebraska*, 491 F. Supp. 1074, 1094 (D. Neb. 1980), *aff'd in part on other grounds & rev'd in part*, 645 F.2d 592 (8th Cir. 1981); *Boxall* v. *Sequoia Union High School Dist.*, 464 F. Supp. 1104, 1112 (N.D. Cal. 1979).

615(e)(2) of the Act, 20 U.S.C. § 1415(e)(2) (1976).[4] She quotes a sentence from the Conference Committee Report on the Act which states that, in an action brought under Section 615(e)(2), the district court "shall grant all appropriate relief . . . without regard to amount in controversy." *See* Petition at 12. Petitioner then asserts, without giving reasons, that the phrase "all appropriate relief" was meant to include money damages and that if money damages had not been intended, the phrase "without regard to amount in controversy" would be meaningless.

The first part of this argument does little more than restate the issue as defined by the court below and by the *Anderson* court. Moreover, the sentence quoted by Petitioner was specifically considered by the *Anderson* court, which concluded that the phrase "all appropriate relief" was intended merely to emphasize that the district court could draw upon all sources in fashioning an appropriate individualized education program. *See Anderson*, 658 F.2d at 1205. This conclusion was part of the resaoning expressly relied on by the Eighth Circuit after it had independently reviewed the relevant legislative history. *See Miener*, 673 F.2d at 979-80.

The second part of Petitioner's argument is totally without merit. It is one of the most elementary principles of federal jurisdiction that the requirement of a specified amount in controvery may apply not only to suits for money damages, but also to actions for injunctive or declaratory relief, and the amount "is measured by the direct pecuniary value of the right that plaintiff seeks to enforce or protect or the value of the object of the suit." 14 C. Wright, A. Miller & E. Cooper, *Federal Prac-*

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[4] Although unstated, the grounds on which Petitioner seeks review of the Eighth Circuit's decision on this issue is apparently that the issue poses "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 17.1(c).

tice and Procedure § 3702, at 383 (1976); *e.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977); *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U.S. 121 (1915). The occurrence of the phrase "without regard to the amount in controversy" in the sentence quoted by Petitioner and in Sections 615(e)(2) and 615(e)(4) of the Act, 20 U.S.C. § 1415(e)(2), (4) (1976), is perfectly consistent with the availability of injunctive relief only, since in this context the phrase would eliminate the necessity of determining in every case brought under Section 615(e)(2) the value to the handicapped child or his parent of the right to a free appropriate public education.[1]

Petitioner has failed to make any substantial challenge of the correctness of the decisions of the court below and the *Anderson* court regarding the availability of monetary relief under EAHCA. The *Anderson* court, and the Eighth Circuit in reliance theron, engaged in a detailed and comprehensive analysis of the statutory language and the legislative intent, as reflected in the legislative history and in the purpose of the Act. *See Anderson*, 658 F.2d at 1209-13. There is no need for this Court to undertake a reexamination of the issue.

The decision of the Eighth Circuit in this case was reached before this Court handed down its decision in *Board of Education of the Hendrick Hudson Central School Dist.* v. *Rowley*, No. 80-1002 (U.S. June 28, 1982). Although the question of whether damages can be recovered under Section 615(e)(2) of the Act was not at issue in *Rowley*, this Court did find that

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[1] Because EAHCA was enacted well before the elimination of the jurisdictional amount requirement in the general federal question statute, 28 U.S.C. § 1331 (Supp. IV 1980), the elimination of a required amount in controversy in suits under Section 615(e)(2) would have been a matter of importance to the framers of EAHCA.

> the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id., slip op. at 14. The Special School District Respondents submit that the Eighth Circuit's holding that Petitioner could not recover damages under the Act was in harmony with this Court's finding of legislative intent in *Rowley* and should not be disturbed.

II. Compensatory Education and the Eleventh Amendment.

The court of appeals held that Petitioner's prayer for compensatory educational services was indistinguishable from a request for money damages, for purposes of determining Defendants' Eleventh Amendment immunity to the claim. Petitioner's second ground for seeking certiorari is that this holding was contrary to decisions of this Court.

The Special School District Respondents note initially that they are unsure whether Petitioner's prayer for compensatory education has been asserted against them. The request for compensatory education is contained in paragraph 3 of the ten-paragraph, separately numbered prayer for relief at the end of Petitioner's Complaint. *See* App. at A-16. Paragraph 3 begins with a general reference to "Defendants," but concludes with the following sentence:

> The State of Missouri and its Departments of Mental Health and Elementary and Secondary Education have failed to provide the proper levels of education for Plaintiff, Terri Ann, and therefore should be found liable to restore as best can be restored at this time, the educability and learning capacity of the Plaintiff, Terri Ann.

Id.

The opinions of the district court provide no clarification as to whom this prayer is asserted against. At the conclusion of the Eighth Circuit's opinion, the court listed its disposition of all claims in the suit, but did not mention the prayer for compensatory education in connection with the Special School District Defendants, and thus indirectly indicated that the court did not think the prayer was directed against them. Moreover, unless this Court grants certiorari in No 82-61 on whether the Eighth Circuit erred in holding that the Special School District Respondents had no Eleventh Amendment immunity from suit for damages, Respondents will have no interest in whether or not Petitioner's prayer was properly characterized as a claim of damages. Nevertheless, in the hope that this Court grants certiorari in No. 82-61 and decides in their favor, and in fear that Petitioner will try to assert her prayer for compensatory education against them upon possible remand to the district court, the Special School District Respondents offer the following observations in support of the Eighth Circuit's holding.

Petitioner's prayer requested the district court to

> [r]equire Defendants to provide prospective relief in the form of *compensatory* services to overcome the effects of any *past* denial of special educational services as defined by the laws of the State of Missouri and by the laws of the United States as aforesaid. . . . It is respectfully submitted that the proper measure of the injury to Terri Ann because of the denial of a full opportunity to education is the cost of an educational program which can restore Terri Ann to the developmental level which she would have achieved by age twenty-one (21) if Defendants had fulfilled their obligation and duty to her.

Id. (emphasis added). Although this is not clearly stated in the prayer itself, the district court found, on the basis of pleadings filed by Petitioner, that Petitioner was seeking "an injunction

forcing the State to educate her past the age of twenty-one." *Miener* v. *Missouri*, 498 F. Supp. 949, 951 (E.D. Mo. 1980). Under Missouri law, the age of twenty-one years is the cutoff point for the provision of special educational services to handicapped children, *see* Mo. Rev. Stat. § 162.675(2), (3) (1978), and EAHCA expressly recognizes the upper age limit set by State law as controlling, *see* 20 U.S.C. § 1412(2)(B) (1976).

Petitioner claims, as she did in the court of appeals, that her prayer seeks only prospective injunctive relief, which was held to be an exception from Eleventh Amendment immunity in *Ex parte Young*, 209 U.S. 123 (1908). In determining whether the relief sought by Petitioner was actually prospective and injunctive for Eleventh Amendment purposes, the Eighth Circuit considered the standards that were stated in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and were applied in other lower court decisions involving claims for similar relief. The court found compensatory education to be "practically indistinguishable" from a tuition reimbursement, an award of which would clearly be barred under *Edelman* as "an award of damages for past breach of legal duty." *Miener*, 673 F.2d at 982. The court then noted that the amount of compensatory services sought by Petitioner would be "measurable against past educational deprivation," *id.*, and the provision of these services "would not . . . ensure '*compliance in the future* with a substantive federal question determination.' " *Id.* (quoting *Edelman*, 415 U.S. at 668 (emphasis added by the court)). Accordingly, the court held that the Eleventh Amendment "bars the award of such compensatory relief as appellant has requested."[4] *Id.*

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[4] The Eighth Circuit's statement of its holding in unqualified terms suggests further that the court did not think Petitioner's prayer was asserted against anyone but the State Defendants.

All of the considerations quoted above, which formed the basis of the Eighth Circuit's holding, were strict and correct applications of the tests found in *Edelman*. Petitioner's argument that the court's holding was contrary to decisions of this Court appears to rest completely on the one case which Petitioner quoted at length, *Milliken* v. *Bradley*, 433 U.S. 267 (1977). Petitioner asserts that the compensatory educational services she seeks are "not very different" from the remedial reading and speech programs ordered by the Court in *Milliken*. The problem with this contention is that the *Milliken* Court did not require the provision of remedial programs to Detroit students beyond the age set by Michigan law as the upper age limit for receiving public education. In contrast, Petitioner is requesting that she be provided compensatory services for some unspecified time beyond the age of twenty-one. If Petitioner were asking only that her individualized educational program be specially designed to make up, as much as possible, for previous alleged deprivations, then the relief sought by Petitioner would correspond with that ordered in *Milliken*. The Eighth Circuit's holding that injunctive relief in the form of compensatory educational services as requested by Petitioner would be tantamount to an award of damages, for purposes of determining Defendants' Eleventh Amendment immunity, was in no way inconsistent with *Milliken* or any other of this Court's decisions. Therefore, the issue is not a proper one for the granting of certiorari.

CONCLUSION

For the reasons stated above, the Special School District Respondents submit that this Court should deny in toto the present Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1050-C(3)

Terri Ann Miener, by and through her next firend and parent, Clyde J. Miener,

Plaintiffs,

vs.

State of Missouri, and Joseph P. Teasdale, Governor; Department of Elementary and Secondary Education of the State of Missouri, Arthur L. Mallory, Commissioner of Education of the Department of Elementary and Secondary Education of the State of Missouri; Dr. Leonard Hall, Assistant Commissioner of Education, The Division of Special Education of the Department of Elementary and Secondary Education of the State of Missouri, The Special School District of St. Louis County Missouri; The Board of Education of the Special School District of St. Louis County, Missouri; Allan G. Barclay, Gerald K. Braznell, and Gerald B. Hansen, Directors of the Special School District of St. Louis County, Missouri; Mr. Thomas E. Smith, Superintendent of Schools of the Special School District of St. Louis County, Missouri; Department of Mental Health of the State of Missouri, Mr. Norman Tice, Commissioner of the Department of Mental Health of the State of Missouri; Dr. Beverly Wilson, Acting Director of the Department of Mental Health of the State of Missouri; Mr. John Twiehaus, individually and in his official capacity as the Acting Superintendent of the St. Louis State Hospital; Dr. Milton Fujita, individually and in his former official capacity as Medical Director of the Youth Center of the St. Louis State Hospital,

Defendants.

(Filed August 27, 1979)

COMPLAINT

I.

Nature of Proceedings

1. This is a proceeding for declaratory judgment as to Plaintiffs' rights, for preliminary and permanent injunction enjoining Defendants from denying Plaintiffs their rights to equal protection under the laws, including the minor Plaintiff's right to a full education under the laws of the United States, for such affirmative relief and appropriate money damages to redress the past, present and future injuries inflicted upon Plaintiffs by Defendants, who have acted and continue to act in such manner as to deprive Plaintiffs of their civil and Constitutional rights, when Defendants knew, or reasonably should have known, that their actions, within their sphere of official responsibility, would violate the constitutional, civil and statutory rights of Plaintiffs.

2. Plaintiff, Terri Ann Miener suffers from behaviorial and emotional diorders and a diminished capacity to learn as a result of recurrent brain tumors. Terri Ann, as a handicapped child, is in need of special educational programs if she is to be trained and educated to the maximum of her ability. It is possible, with an immediate undertaking of a carefully designed program, to make Terri Ann a self-sustaining adult.

3. The State of Missouri and its various agencies has a responsibility under the Education of All Handicapped Children Act, the Rehabilitation Act, and the Constitution of the United States to provide Terri Ann with an education which treats her equally with other similarly situated persons and which provides her with a full educational opportunity.

4. The State of Missouri and its various agencies have failed to provide for Terri Ann's education needs and has denied her the equal protection of the laws. This suit is brought to remedy this situation and assure that Plaintiff, Terri Ann Miener, receives the full measure of her rights under State and Federal Law.

II.

Jurisdiction

5. The jurisdiction of this Court over this action is invoked under Title 42, United States Code, 1983, in that Plaintiffs are being deprived of their rights as secured by the Constitution of the United States of America, and particularly under: The Fifth and Fourteenth Amendments; or as secured by Title 29, United States Code, Section 794; Title 20, United States Code, Sections 1411-1420; such jurisdiction authorized under Title 28, United States Code, Sections 2201, 2204, 1331 and 1343(3) and (4). This Court has pendent jurisdiction over Plaintiffs' claims for relief and remedy from the personal injuries inflicted upon Terri Ann Miener while in the custody of the Missouri Department of Mental Health.

III.

The Parties

6. Plaintiff, Terri Ann Miener, born May 1, 1962, is a citizen of the United States, a resident of the St. Louis State Hospital, situated in the City of St. Louis in the State of Missouri, and a domiciliary of the County of St. Louis, State of Missouri.

7. Plaintiff's next friend and parent, Clyde J. Miener, is a citizen of the United States and a resident of the County of St. Louis in the State of Missouri.

8. Defendant, State of Missouri, is a body politic and a real party at interest, and Defendant Joseph Teasdale is the Governor of the State of Missouri and its Chief Executive Officer, whose offices are located in Jefferson City, Cole County, Missouri.

9. Defendant, Department of Elementary and Secondary Education of the State of Missouri, is a department of the executive branch of the government of the State of Missouri with its offices located in Jefferson City, Cole County, Missouri.

10. Defendant, Arthur J. Mallory, is the Commissioner of the Department of Elementary and Secondary Education of the State of Missouri, and his official offices are located in Jefferson City, Cole County, Missouri.

11. Defendant, Dr. Leonard Hall, is an Assistant Commissioner of the Department of Elementary and Secondary Education of the State of Missouri with his official offices in Jefferson City, Cole County, Missouri.

12. Defendant, Special School District of the County of St. Louis, Missouri is a body politic and political subdivisi[illegible] of the State of Missouri, and is a real party at interest. The St. Louis County Special School District is situated entirely within the County of St. Louis, in the State of Missouri, with offices at 12110 Clayton Road, St. Louis, Missouri 63131.

13. Defendant, Board of Education of the Special School District of the State of Missouri is the duly constituted, elected and acting governing body of said district, said district being organized, operated and administered pursuant to the laws of the State of Missouri and may be served with process by serving the clerk thereof at the Board's administrative offices at 12110 Clayton Road, St. Louis, Missouri 63131.

14. Defendant, Allan G. Barclay, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

15. Defendant, Gerald K. Braznell, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

16. Defendant, Gerald B. Hansen, is a Director of the Special School District of the State of Missouri, resides in the County of St. Louis, State of Missouri, and maintains his official office at 12110 Clayton Road, St. Louis, Missouri 63131.

17. Defendant, Thomas E. Smith, the Superintendent of Schools of the Special School District of St. Louis County, Missouri, maintains his offical offices at 12110 Clayton Road, St. Louis, Missouri, and is a resident of the County of St. Louis in the State of Missouri.

18. Defendant, Department of Mental Health of the State of Missouri, is a department of the executive branch of the government of the State of Missouri and its offices are located in Jefferson County, Cole County, Missouri.

19. Defendant, Norman Tice, is the Commissioner of Mental Health for the State of Missouri and maintains his official offices in Jefferson City, Cole County, Missouri.

20. Defendant, Dr. Beverly Wilson, is the Acting Director of the Department of Mental Health of the State of Missouri, and has her official offices located at Jefferson City, Cole County, Missouri.

21. Defendant, John Twiehaus, is the acting superintendent of the St. Louis State Hospital at 5400 Arsenal Street, St. Louis, Missouri.

22. Defendant, Dr. Milton Fujita, is the former Medical Director of the Youth Center of the St. Louis State Hospital and resides in the County of St. Louis, Missouri. Dr. Fujita maintains an office at 11906 Manchester Road, St. Louis, Missouri.

IV.

First Claim for Relief:
Deprivation of Plaintiff's Right to a Full Educational Opportunity

23. Plaintiff, Terri Ann Miener, a minor of the age of 17, born May 1, 1962, is currently a voluntary resident at the St. Louis State Hospital at 5400 Arsenal Street in the City of St. Louis. Due to recurrent brain tumors and subsequent ill-effects of the surgery to remove those tumors, Terri Ann has suffered and continues to suffer from a diminished capacity for learning and has exhibited great difficulties in her emotional and behavioral development as a direct result thereof.

24. In September, 1976, Terri Ann was released from the hospital after cranial surgery and after post-operative recovery time, and was taken to Defendant, Special School District of St. Louis County, Missouri, for evaluation of her ability and capacity to be educated. The report of the Special School District's evaluation clinic, dated February 4, 1977, indicated the serious educational, emotional and behavioral disabilities of Terri Ann. A reevaluation was performed at the request of Plaintiff, Clyde J. Miener, on May 19, 1978. These reports found that Terri was learning disabled, behaviorally disordered, visually impaired and orthopedically handicapped.

25. During most of 1977, Terri Ann was placed in the Youth Center of the St. Louis State Hospital as a voluntary patient. On June 23, 1977, Terri Ann was voluntarily admitted as a full time resident at the Youth Center at the St. Louis State Hospital.

26. Terri Ann has a very limited attention span and her memory is intermittent. She demands constant attention from those persons teaching or otherwise caring for her. She is approximately four (4) years behind normal in her phsyical development. She is visually impaired.

27. Because of her multiple mental and physical handicaps, Terri Ann requires a one-on-one teaching environment. She needs constant reminders to stay with the task at hand, she needs continual encouragement and guidance. Terri Ann becomes anxious and disruptive when left to herself.

28. For these reasons, a highly structured learning environment is needed. She needs a continuous, supportive and warm relationship with her educators in a residental setting. She is not receiving the benefits of such a program from the St. Louis State Hospital nor the Special School District of St. Louis County, Missouri. These agencies simply do not have the time, staff, facilities or funds to provide for Terri Ann's needs. For the last three years, her education has been wholly inadequate.

29. Defendant, State of Missouri, individually and by and through its Departments of Mental Health and Elementary and Secondary Education, receives funding from the government of the United States under Title 20 of the United States Code and other authorities.

30. Under the provisions of Title 20, United States Code, Section 1411-1420, in order to qualify for assistance under the Sub-Chapter II Assistance for Education of All Handicapped Children Act [hereinafter Sub-Chapter II], a state must have in effect a policy which assures that all handicapped children are given a free and appropriate public school education. In spite of this mandate, Defendant State of Missouri, and its Departments of Mental Health and Elementary and Secondary Education have failed to satisfy their duty of providing full educational opportunity for Terri Ann as required by 20 U.S.C. §1412. Under

the requirements of 20 U.S.C. §1412(2)(B) a free appropriate public education must be made available to all children.

31. Under the provisions of 20 U.S.C. §§1411-1420, and the rules and regulations promulgated thereto by the Department of Health, Education and Welfare, each local educational agency of the State of Missouri, in order to receive funds under Sub-Chapter II, must maintain records of the individualized education program (I.E.P.) of each student, and each public agency must provide special education and related services to handicapped children in accordance with that I.E.P.

32. Defendant, Special School District of St. Louis County, pursuant to the Rules and Regulations promulgated under Sub-Chapter II by the Department of Health, Education and Welfare, must assure that, any placement in a public or private residential program made necessary to provide special education and related services to a handicapped child, including non-medical care and room and board, be at no cost to the parents of the child.

33. As previously stated, Defendant State of Missouri, individually and by and through its agents and departments, Defendants herein, has received funding from the Government of the United States for the financing of programs concerning the training and education of handicapped children of the State of Missouri. The State of Missouri, its Department of Elementary and Secondary Education, acting by and through Defendants Mallory, Hall, and the Special School District of St. Louis County, acting by and through Defendants Tice, Smith, Barclay, Braznell and Hansen, has failed to provide an appropriate educational opportunity for Terri Ann in that it has failed to provide appropriate residential education and treatment which is required to provide Terri Ann with a full educational opportunity as mandated by Federal statute and regulation.

34. Furthermore, according to the H.E.W. Regulations, it is the responsibility of the Missouri Department of Elementary and Secondary Education to insure that all other state agencies establish and implement a goal of providing full educational opportunity to all handicapped children in the area served by those public agencies. Each educational program for handicapped children administered within the state, including each program administered by any non-education agencies must (a) be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency and (b) meet educational standards of the state educational agency. The State of Missouri and its Department of Elementary and Secondary Education have failed to comply with these rules and regulations. Moreover, the Department of Mental Health of the State of Missouri by and through Defendant's Tice, Wilson, Twiehaus, and Fujita, has failed to establish and implement a program designed to provide a full educational opportunity for Terri Ann. These Defendants' actions have deprived her of her right to a full education.

35. Under the provisions of 20 U.S.C. §1415, jurisdiction is granted to the federal district courts to review matters of this nature raised by aggrieved parents following the due process hearing procedures set out in this section.

36. Plaintiffs have not exhausted the administrative hearing remedy as set out in 20 U.S.C. §1415. There are three reasons why Plaintiffs cannot exhaust the administrative remedies prior to seeking the jurisdiction of this Court.

A. Plaintiff, Terri Ann Miener, while in the custody of the St. Louis State Hospital, has been and will continue to be subject to great physical abuse and serious bodily injury as a result of the intentional assaults upon her by unknown persons at the State Hospital. She remains in great personal danger each day

she remains in that facility. The delays inherent in the "due process procedure" of 20 U.S.C. §1415 will cause continued physical injury and irreparable harm to Terri Ann.

B. Plaintiff's next friend and parent, Clyde J. Miener, has made repeated requests to all Defendants herein named to properly evaluate Terri Ann, and thereby establish a proper individual education program so that Terri Ann might enjoy her rights under federal law to a full appropriate public education. Plaintiff's next friend's numerous attempts to resolve this matter through the state agencies herein named as Defendants clearly demonstrates it would be a useless and unconscionable delay to require Plaintiffs to exhaust the administrative procedures as established by the State of Missouri, in the face of the State's continual inaction. It is clear that each and every day which Terri Ann spends at the State Hospital facility and not in a proper residential placement where she can get appropriate education, irreparably damages her overall capacity to be educated.

C. Furthermore, it is clear that the due process hearing requirements set out in 20 U.S.C. §1415 are illegally and improperly implemented in the Missouri Statutes which establish the State's hearing procedures, V.A.M.S. §§162.961-162.965. These statutory procedures cause delay and do not further the aims of Sub-Chapter II in three particular, ways:

(1) The Missouri Statutes require the due process hearings are to be conducted by an improper person. V.A.M.S. §162.961(1) specifically requires the initial due process hearing be conducted by the chief administrative officer of the responsible school district. Defendant, State of Missouri has not followed the requirements of the Rules and Regulations of the Department of Health, Education and Welfare, at Volume 42 of the Federal Register, Pages 42494-96, Section 121a.507(a), which forbid hearings conducted by persons who are employees of the public

agency. The chief administrative officer is clearly an "employee" of the public agency involved in the education of the child, and therefore, an improper hearing examiner.

(2) The minimal time requirements to pursue the Missouri procedure are more than twice the maximum allowable time provided in the H.E.W. Regulations. The Federal requirement under 42 Fed. Reg., Pg. 42496, Section 121a.512, requires that the agency having initial responsibility (local school district) for the due process hearing provide a final decision within 45 days of receipt of a request for such hearing. However, under V.A.M.S. §162.950, the hearing with the chief administrative officer of the school district must be made within 30 days of notice from the aggrieved parent. The parent may then appeal to a three person panel set up by the local school district within ten days after receiving notice. After "proper deliberation" such panel shall determine whether the case warrants formal review by the Board of Education. Thereafter, upon receipt of the recommendation of the panel or upon written request of the parent, the local school board has 30 days in which to hold hearings on the matter in question, and 30 days from that hearing in which to render its opinion. Thus, the total time set out in the Missouri Statute for compliance with the due process hearing requirement of 20 U.S.C. 1415 is in excess of 100 days, far exceeding the required maximum 45 day period set out in the federal law.

(3) There is no procedure in Chapter 162 V.A.M.S. establishing a review procedure for an aggrieved parent to present his views before the State Board of Education (except in the case of cases concerning state schools, §162.962 V.A.M.S.) as required by the Rules and Regulations promulgated pursuant to 20 U.S.C. §1415 as found in Volume 42 of the Federal Register at Page 42496, Section 121a.510.

(4) For the foregoing reasons, the administrative hearing procedures set up by the Missouri Statutes do not comply with the requirements of 20 U.S.C. §§1411-1420. Moreover, the administrative hearing procedure set up by the Missouri Statutes unconstitutionally deprive Plaintiffs of their due process rights in that they create so cumbersome a procedure as to make it impossible for Plaintiffs to determine and protect their rights within a reasonable time.

Second Claim for Relief:
Denial of Equal Access to Publicly Supported Education

37. Defendants, Mallory, the Department of Elementary and Secondary Education of the State of Missouri, Special School District of Missouri, Smith, Barclay, Braznell, Hansen and the Board of Education of the Special School District of St. Louis County, Missouri have established and do maintain a special school program in the County of St. Louis; that as a part of their program they provide special education services for the mentally and physically handicapped and retarded.

38. Plaintiff, Terri Ann Miener, since the beginning of the fall term of 1977, has been a domiciliary of St. Louis County, willing and able to participate in appropriate special education programs of the Board of Education of the Special School District of the County of St. Louis, and is fully eligible to participate if any should be implemented for her.

39. The above named Defendants have refused to allow Plaintiff Terri Ann Miener, to fully participate in their programs and have provided for her mere custodial care. Such refusal on the part of said Defendants is discriminatory, arbitrary, capricious, unreasonable and without just cause; Plaintiff, Terri Ann, has and will continue to sustain damages as a result thereof.

40. Such refusal of said Defendants is a denial of Plaintiff, Terri Ann's, rights to equal protection under the law and is

denial of due process of law as guaranteed to this Plaintiff by the Fifth and Fourteenth Amendments of the United States Constitution.

41. Defendants, by such refusal, are using public monies and public lands for discriminatory purposes, contrary to law.

42. An injunction should be granted enjoining Defendants and each of them from refusing to allow Plaintiff, Terri Ann Miener, to fully participate in the programs of the Special School District of the County of St. Louis; irreparable damage has occurred and will continue to result if an injunction is not granted, for the reason that Plaintiff, Terri Ann Miener's, overall capacity to learn will diminish with each and every day of said Defendant's failure to allow said Plaintiff to participate in Defendants' special education program.

Third Claim for Relief:
Denial of Equal Access to Treatment

43. Defendants, Wilson, Tice, the Department of Mental Health in the State of Missouri, Twiehaus and Fujita, acting under the authority of the State of Missouri supervise, manage and maintain a Youth Center and a State Hospital for the mentally incompetent; as a part of their program they have established custodial wards and facilities to house the mentally incompetent, especially youths with various behavioral disorders; Plaintiff, Terri Ann, is housed in the Youth Center of the St. Louis State Hospital under the care, custody and control of aforesaid Defendants.

44. Said Defendants maintain the facilities by means of public revenues, and use public lands in supporting, maintaining and sponsoring said mental health programs.

45. Plaintiff, Terri Ann, has been a day care resident or full time resident at the Youth Center facility since June, 1977.

46. Above named Defendants have discriminatorily refused to allow Plaintiff, Terri Ann, the opportunity to be fully educationed as is her right under 20 U.S.C. §§1411-1420, and in violation of her rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

47. Aforesaid Defendants have discriminated against Plaintiff, Terri Ann, on the basis of her physical and mental handicaps in violation of 29 U.S.C. §794 by their refusal to give Plaintiff, Terri Ann Miener, equal access to all facilities, all programs, and in particular, the programs of education available to other persons similarly situated.

48. Such refusal on the part of Defendants is discriminatory, arbitrary, capricious, unreasonable, and without just cause; Plaintiff has suffered and will continue to suffer damages as a result thereof.

49. The aforesaid activities of Defendants constitute a denial of Plaintiff, Terri Ann's equal protection and is a denial of due process of law as guaranteed to this Plaintiff by the Fifth and Fourteenth Amendments of the United States Constitution.

50. Defendants, by such refusal, are using monies and public lands for discriminatory purposes, contrary to law.

51. Furthermore, Plaintiff, Terri Ann, has suffered and will continue to suffer physical injury, abuse, pain and suffering as a direct result of the discriminatory activities of said Defendants who knew or should have known that their acts, constituting a denial of Terri Ann's right to equal protection of the law, would so injure her.

52. A preliminary and permanent injunction should be granted enjoining these Defendants and each of them from refusing to allow Plaintiff Terri Ann equal acess to all programs and facilities of Defendants' organizations; irreparable damage

has and will continue to result if an injunction is not granted, for the reason that Plaintiff, Terri Ann Miener's, overall capacity and ability to be educated will be irreparably harmed, for which there is no adequate remedy at law.

Fourth Claim for Relief:
Plaintiff Terri Ann Miener's Personal Injuries

53. During the time of her residency at the St. Louis State Hospital, Plaintiff, Terri Ann, has been the subject of attacks and beatings by her fellow residents and has also been the object of injuries suffered because of the negligent acts of the medical and custodial staff of the hospital.

54. During this time, the St. Louis State Hospital and the facility in which Terri Ann is a resident, were under the supervision and control of the Defendants, Twiehaus and Fujita. These Defendants were responsible for, and did attempt to supervise and operate the activities of the facility wherein Plaintiff, Terri Ann, resided, pursuant to V.A.M.S. §202.050.

55. It was the duty of the aforesaid Defendants to provide a suitably safe environment for the residents of the St. Louis State Hospital, one in which said residents were not subject to physical attacks or negligent injuries inflicted by the residents and staff of said facility.

56. Defendants failed to provide such a safe and secure facility.

57. Plaintiff, Terri Ann, was injured by unknown persons while a resident of the St. Louis State Hospital as a direct and proximate result of the failure of the aforesaid Defendants to provide a safe and secure facility.

58. The aforesaid Defendants acted in such a grossly negligent manner in their management and control of said facility as to

place their conduct outside the scope of their official duties. Therefore, Defendants, Twiehaus and Fujita, are individually responsible the injuries inflicted upon the Plaintiff, Terri Ann Miener.

WHEREFORE, Plaintiffs respectfully pray this Court:

1. Declare §162.961-162.965 of the Statutes of Missouri unconstitutional on their face, and declare unconstitutional the acts of Defendants, their agents, employees or successors, in applying said Section in the manner as aforesaid.

2. Declare §162.961-162.965, V.A.M.S. violative of 20 U.S.C. §1415, and declare the acts of Defendants, their agents, employees or successors, in applying the provisions of these Sections to Plaintiffs as aforesaid to be violative of said United States Code.

3. Require Defendants to provide prospective relief in the form of compensatory services to overcome the effects of any past denial of special educational services as defined by the laws of the State of Missouri and by the laws of the United States as aforesaid. Such services can and should be provided at the Brown School is Austin, Texas, at no cost to the Plaintiff, Clyde J. Miener. It is respectfully submitted that the proper measure of the injury to Terri Ann because of the denial of a full opportunity to education is the cost of an educational program which can restore Terri Ann to the developmental level which she would have achieved by age twenty-one (21) if Defendants had fulfilled their obligation and duty to her. The State of Missouri and its Departments of Mental Health and Elementary and Secondary Education have failed to provide the proper levels of education for Plaintiff, Terri Ann, and therefore should be found liable to restore as best can be restored at this time, the educability and learning capacity of the Plaintiff, Terri Ann.

4. Award Plaintiffs judgment against all named Defendants, jointly and severally, the sum of Fifty Thousand Dollars ($50,000.00) for the injuries received by Plaintiff, Terri Ann, while in the custody and care of the named Defendants, by whose actions, in depriving Terri Ann Miener of the equal protection of the laws, and depriving her of her civil and constitutional rights, grieviously injured her.

5. Issue injunctions enjoining Defendants, Wilson, Tice, the Department of Mental Health of the State of Missouri and Twiehaus, in his official capacity as Acting Superintendent of the St. Louis State Hospital, from discriminating against Plaintiff, Terri Ann Miener, by refusing to allow her equal access to all programs and facilities of said State Hospital; and issue an injunction enjoining these Defendants from enforcing any and all rules, regulations, decisions and policies which are discriminatory in nature, and which would prohibit the Plaintiff from having equal treatment as required by the law.

6. Issue injunctions enjoining the Defendants, Mallory, Hall, the Department of Elementary and Secondary Education of the State of Missouri, Smith, Barclay, Braznell, Hansen, the Board of Education of the Special School District of St. Louis County, Missouri, and Special School District of St. Louis County, Missouri, from discriminating against Plaintiff, Terri Ann Miener, by refusing to allow her to participate in the special education programs of said school district; and issue injunctions enjoining these Defendants from continuing to engage in such practices which are discriminatory in nature.

7. Grant damages against Defendants State of Missouri, Department of Mental Health, Department of Elementary and Secondary Education and Special School District of St. Louis County, Missouri, for violation of Plaintiffs' statutory and civil rights in denying to Plaintiff her rights to a full and adequate education as guaranteed by the laws of the United States in the

amount of Four Hundred Seventy-Four Thousand Three Hundred Fifty-Eight Dollars ($474,358.00).

8. Award damages against Defendants, Twiehaus and Fujita, in the amount of Fifteen Thousand Dollars ($15,000.00) for the personal injuries received by Terri Ann Miener while a resident of the St. Louis State Hospital.

9. Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to grant such declaratory, injunctive, and monetary relief, and such other and further relief as may be just and proper in the determination of this Court.

10. Grant Plaintiffs the costs of the prosecution of this action, including but not limited to reasonable attorney's fees, suit costs and court costs.

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